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No. 04-185

In the

Supreme Court of the United States

GARY LAATSCH and LAW OFFICE OF PAVALON, GIFFORD, LAATSCH & MARINO,

Petitioners,

v.

HELEN MIHAILOVICH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

To prevail in this legal malpractice action, respondent, Helen Mihailovich, had to prove "a case within a case." That is, she had to prove that petitioners had negligently handled her underlying personal injury action, which had charged the County with negligently maintaining a dangerous roadway that was extremely slippery when wet. To support her legal malpractice claim, Mihailovich sought to introduce evidence that in the four-and-a-half years surrounding the accident, there had been approximately one hundred other motor vehicle accidents at the same location on the roadway, and that the vast majority of those accidents occurred under similar conditions as her own—when the roadway was wet. The district court barred all evidence of other accidents. The Seventh Circuit reversed that ruling as an abuse of discretion, finding the other accidents substantially similar to respondent's, and deemed the error prejudicial.

Have petitioners shown that the Seventh Circuit's ruling was such a departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power where the ruling properly relied on the governing legal standard—which the district court had misconstrued—and exhaustively considered whether the other accidents were substantially similar to the accident at issue in the instant suit?

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The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 359 F.3d 892, 63 Fed. R. Evid. Serv. 1122 (7th Cir. (Ill.) 2004); rehearing denied (May 5, 2004).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment, vacating the judgment in favor of petitioners and remanding the case for a new trial on March 5, 2004. The circuit court denied petitioner's petition for rehearing on May 5, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners paint a picture of an unfortunate automobile accident involving Helen Mihailovich, who lost her underlying personal injury case against the County because she could not pinpoint where her accident occurred on a reverse S-curve and she could not tell anyone how it happened. (Pet. at 2-3.) They portray petitioner Laatsch as a diligent attorney who, through no fault of his own, could not build a case for Mihailovich because neither he nor the lawyers whom her late husband had previously hired could determine the exact location of where Mihailovich's van left the roadway and because "it was not possible to replicate the conditions that existed at the time of the accident." (Pet. at 3-4.) Thus, petitioners intimate that Mihailovich rightfully lost her personal injury action against the County and, concomitantly, properly lost her legal malpractice case against them.

This picture is inaccurate and incomplete. The precise point where the Mihailovich van left the roadway was

never a dispositive issue. The record showed that the accident occurred on a reverse S-curve that began on 205th Street and continued to 207th Street on Kedzie Avenue in Olympia Fields, Cook County, Illinois; the van in which Mihailovich was riding entered the curve at 205th Street and came to rest in front of a home located at 20540 S. Kedzie. (Pet. App. at 2-3.) In other words, it was apparent to all that the van left the roadway shortly after it entered the curve, like so many other accidents before. (The Police were well aware of the roadway statistics at this point.

The record also showed that Laatsch was far from diligent in his pursuit of Mihailovich's claim. The circuit court spent 18 months preparing a 54-page opinion in this case, detailing the significant lapses in Laatsch's investigation and preparation of the underlying road design case, observing in part:

> Laatsch did not undertake the following steps: (1) He never spoke with Mark Fazzini, the Olympia Fields police officer who investigated the scene of the Mihailovich accident, choosing instead to rely on Fazzini's accident report. (2) He neither contacted nor deposed any Olympia Fields official, including Healy [the Village president] or Field [a member of the Village board of trustees], to discuss the Village's 1984 resolution regarding the Kedzie curve or the basis for that resolution. (3) Other than Waters [a sign technician employed by the County], who disclosed in his deposition that he was not responsible for the road surface of the Kedzie curve, Laatsch did not depose any of the witnesses disclosed in the County's response to his interrogatories or that Waters named in his deposition—including County Highway Superintendent Golterman, Chief Engineer Kaindl, or Village President Healy. In fact, Waters was the sole individual that Laatsch deposed. (4) Laatsch

> did not attempt to engage an expert until 1992, [six years after the accident and five years after filing the complaint] when he contacted Berg [a civil engineer]. (5) Laatsch did not obtain data regarding the other accidents that had occurred at the Kedzie curve. (6) He did not attempt to ascertain whether the signs that the County had installed at the curve in 1984-1985, partly in response to Olympia Fields' resolution, had affected the accident rate and/or addressed the concerns that had prompted the Village to pass the resolution. (7) He failed to respond to the interrogatories that the County had issued, and he did not comply with the state court's order to identify the witnesses who might testify on Mihailovich's behalf at trial.

(Pet. App. at 17-18.)

This wasn't all that Laatsch did wrong. As the Seventh Circuit further detailed, Laatcsh voluntarily dismissed the suit when it was called for trial and refiled it the following year; he neither engaged in any further discovery after the case was restored to the court's docket nor did he inform Mihailovich that he had dismissed and then refiled her suit. (Pet. App. at 18.) Laatsch also misinformed the state court trial judge that "extensive discovery" had been completed and that Mihailovich would probably have an expert witness testify at trial. In fact, he had no expert in mind. *Id.* He agreed to a short trial date but then failed to disclose any witnesses, resulting in the entry of an order barring Mihailovich from calling any witnesses to testify. *Id.* Shortly thereafter, Laatsch withdrew from the case and ultimately, the County obtained summary judgment in its favor. Indeed, the Seventh Circuit noted that on appeal of the judgment entered on the jury's verdict in the legal malpractice case, "both parties have assumed that Mihailovich presented sufficient evidence . . . that Laatsch breached the duty of care that he owed Mihailovich as her attorney." (Pet. App. at 24-25.) The court agreed with that assumption. (*Id.* at 25.)

REASONS FOR DENYING THE WRIT

I. THE CIRCUIT COURT DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS; IT APPLIED SETTLED FACTORS TO DETERMINE WHETHER THE OTHER ACCIDENTS WERE SUFFICIENTLY SIMILAR TO MIHAILOVICH'S ACCIDENT.

Petitioners do not contend that the Seventh Circuit's opinion conflicts with the decision of another United States court of appeals on the same important matter. They do not claim that the Seventh Circuit has decided an important federal question in a way that conflicts with a decision by a state court of last resort. Instead, they maintain, in their "Questions Presented For Review" that the court's ruling has "departed from the accepted and usual course of judicial proceedings as to warrant review by this Honorable court." But, they never explain this "departure" in the body of their petition. And they never cite any authority in support of this claim.

Review of the opinion demonstrates that the Seventh Circuit did not depart from the accepted and usual course of judicial proceedings. It applied settled law to the extensive facts before it. That court examined the district court's analysis of the issue and pointed out the flaws in the district court's reasoning with great care. Petitioners asked the court to reconsider its ruling and were unable to muster a single vote. Nothing about the Seventh Circuit's well-reasoned opinion requires further review.

The law on the admissibility of other accidents to prove a danger in a location[1] is settled. The Seventh Circuit pointed out that its "own precedents recognize that other accidents are generally deemed admissible both to prove

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[1] Petitioners' assertion that respondent sought to introduce this evidence to prove notice (Pet. at 7.) is incorrect.

the existence of a defect or danger in a location or a product and to show that the defendant had not of the defect or danger, so long as the other accidents are 'substantially similar' to the accident at issue in the litigation." (Pet. App. at 29; citations omitted.) The court recognized that when, "as here, the other accidents are offered as proof of a dangerous condition, [footnote omitted] courts insist on a greater degree of similarity between those accidents and the one at issue than they do when the other incidents are offered solely to establish notice of a potential danger to the defendant." (Pet. App. at 30.) And, the court explained that in looking at the established facts underlying the plaintiff's accident and the other accidents proffered, it was required to "consider whether those facts reasonably support an inference that all of the accidents share a common cause— *i.e.*, the danger that the plaintiff has alleged." (Pet. App. at 30.)

Nothing about this approach to the issue departs from the accepted and usual course of judicial proceedings. Indeed, the district court judges in the Seventh Circuit have already taken to citing *Mihailovich* for these, and other, basic legal propositions. *See, e.g., Dewick v. Maytag Corporation*, 324 F.Supp. 894, 904 (N.D. Ill. 2004) (In products liability action stemming from incident where baby climbed inside broiler compartment of kitchen range, evidence of prior accidents involving the same range model and other young children was admissible for showing that defendant had notice of defect or danger and that likelihood of injury from defect was foreseeable even though the other children were older than the plaintiff and even though the plaintiff could not say how their child opened the broiler door.). *See also, Malone v. Pipefitters' Ass'n Local Union 597*, 2004 WL 1881778, *2 (N.D.Ill.) (plaintiff barred from admitting evidence of prior judgments against the union where two of the cases were not recent and they were not sufficiently similar to plaintiffs hostile work environment claim so that they were of little probative

value as balanced against the unfair prejudice to the Union.)

The Seventh Circuit's analysis of the district court's error was likewise well-reasoned and within the accepted and usual course of judicial proceedings. After explaining why the district court's balancing process failed to give the other accident evidence the weight it deserved in terms of its probative value, the court detailed how the district court had misapplied its holding in *Kelsay v. Consolidated Rail* Corporation, 749 F.2d 437 (7th Cir. 1984):

> [R]eferencing our opinion in *Kelsay* as its primary guidepost, the court found that the justifications that *Kelsay* cited for the exclusion of other-accident evidence in that case also weighed in favor of exclusion here.
>
> But our decision in *Kelsay* does not mandate the exclusion of the other-accident evidence tendered here. *Kelsay*, which involved the collision of a train with an automobile at a railroad crossing, affirmed (over a dissent) the district court's decision to exclude evidence of two fatal accidents that had occurred at the same crossing twelve and thirty years earlier. We cited four factors that in our view supported the exclusion of the prior-accident evidence: (1) key differences in the conditions and circumstances of the prior accidents, (2) the absence of evidence that lawsuits had been filed on behalf of the deceased motorists in the prior accidents, which suggested that the drivers themselves may have been at fault, (3) the danger that the jury might infer from the prior accidents alone that the railroad crossing at issue was hazardous, and (4) the plaintiff's ability to show through other evidence that the conditions at the crossing had remained unchanged for a number of years, so that the potential danger would have been evident to

> the railroad. 749 F.2d at 443. Nothing in our opinion suggested that this was an exhaustive list of pertinent considerations or that the factors we identified would apply with the same force in any case involving other-accident evidence. It bears mentioning in that regard that we had first identified these factors in *Gardner v. Southern Ry. Sys.*, 675 F.2d 949, 952 (7th Cir.1982), as being among the "many factors" that the district judge "undoubtedly" had considered in excluding other-accident evidence; *Gardner* itself did not cite any precedents that focused on these factors. The governing standard, however, as cases both before and after *Gardner* and *Kelsay* make clear, was and is whether the other accidents are substantially similar to the accident at issue in the instant suit. *See, e.g., Buscaglia*, 25 F.3d at 533; *Carey*, 929 F.2d at 1235 n. 2; *Walker*, 487 F.2d at 599; *Lever Bros.*, 131 F.2d at 777.

(Pet. App. at 34-35.)

The court further distinguished *Kelsay* on its facts, noting that: (1) the other accidents in *Kelsay* were "quite remote in time from the incident under litigation"; (2) they occurred under circumstances "suggesting that something other than the hazardous nature of the railroad crossing was at fault"; (3) the other accidents in *Kelsay* both involved fatalities, "so that the lack of evidence that lawsuits had not been filed in those cases was more telling than it would be her, where the vast majority of the other accidents did not result in deaths"; (4) any inference the jury might make in this case that the prior accidents show that the Kedzie curve was dangerous, "would not be as inappropriate as it might have been in *Kelsay*" where the other accidents proffered in this case "fall into a pattern suggesting that the Kedzie curve indeed did become dangerously slippery when wet"; and finally, (5) the fact that the County was on notice of the condition of the curve

was "beside the point" where respondent was seeking to admit it to prove that the pavement of the curve was dangerous and "[a]lmost none of the evidence that was admitted by the court in this case went to that important point."[2](Pet. App. at 37-39.)

Petitioners have not explained the flaw in the Seventh Circuit's methodology. Nor can they. In sum and short, there is no merit to the essential premise of their petition. For this reason, it should be denied.

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[2] In their discussion of the absence of "other litigation against the County with respect to the Kedzie curve," petitioners state that "Respondent presented no evidence to permit a conclusion that the number of accidents at the curve was high" (Pet. at 11, n.1.) This statement is highly deceptive. As the Seventh Circuit pointed out, the Village president, the police officer who was called to the accident site and a Village trustee were all barred from testifying that no other curve in the Village had a comparable rate of accidents, injuries and fatalities, that the curve had "far more [accidents] than at any other curve in the Village" and that a multi-year inventory of traffic accidents that had occurred at the curve showed that "more traffic accidents had occurred on the Kedzie curve than in the rest of the Village combined." (*See*, Pet. App. at 11-13.)

II. THE CIRCUIT COURT REASONABLY FOUND THAT MIHAILOVICH HAD MADE ENOUGH OF A RECORD REGARDING THE OTHER ACCIDENTS TO SHOW SUBSTANTIAL SIMILARITY BETWEEN THOSE ACCIDENTS AND HER OWN.

The true essence of petitioners' argument is that the Seventh Circuit should not have reversed the district court's ruling barring evidence of similar accidents because the district court had wide discretion in this matter. (Pet. at 7.) This argument ignores the notion that "wide discretion" is not unbounded.

An abuse of discretion exists when a judge acts unreasonably or exercises his or her discretion in an arbitrary and capricious manner. *Ladd v. ITT Corp.*, 148 F.3d 753, 754 (7th Cir.1998). In this case, the Seventh Circuit detailed the mounds of evidence supporting its holding that the district court's ruling was unreasonable:

> Laatsch suggests at the outset that Mihailovich did not make enough of a record regarding the other accidents at the Kedzie curve to show substantial similarity between those accidents and her own, but we disagree. The record before us includes a year-by-year tabulation, prepared by Unger, then the chief of police of Olympia Fields, of the accidents that had occurred at the Kedzie curve from January 1, 1983 through July 15, 1987; [Footnote omitted.] police reports for some (but by no means all) of the accidents that had occurred at the curve in 1981 through 1986; and the compilations and analyses of the accident data reflected in the reports of both Box and Berg [two engineers retained by plaintiff]. Mihailovich cited and presented this information to the district court prior to trial, both in opposing (successfully) Laatsch's motion for summary judgment and in opposing (unsuccessfully) the County's motion *in limine* to

> exclude evidence concerning the other accidents. *See, e.g.*, R. 62 (Plaintiff's Local Rule 56.1 Statement of Undisputed Material Facts) Exs. 6 (Berg Report), 24 (Kedzie curve accident data); R. 105 (Plaintiff's Response to Defendant's Motion In Limine No. 2) Attachment (Box Report). The police reports for some of the accidents that occurred at the curve in 1981 through 1986 were attached to Mihailovich's malpractice complaint. R. 1 Ex. J. Collectively, this data, coupled with the other evidence of record, tends to show that: (1) the other accidents occurred along the Kedzie curve; (2) they occurred relatively close in time to the Mihailovich accident; (3) the condition of the curve was no different at the time of the Mihailovich accident than it was at the time of the other accidents (the curve itself had not been resurfaced since the 1970s, and would not be resurfaced until 1988 or 1989); (4) a majority of the accidents (roughly three-quarters of the total from 1983 through mid-July 1987) occurred on wet pavement, just as the Mihailovich accident did; and (5) although the police reports (and Berg's analysis of the reports for twenty-four of the twenty-nine accidents that occurred in the eighteen months immediately prior to the Mihailovich accident) reveal variations in precisely where each vehicle left the roadway and what happened as a result (for example, some vehicles collided with oncoming traffic, while others came to rest on either side of the roadway), the reports reveal a pattern of drivers losing control of their vehicles while on the curve, particularly when the roadway was wet.

(Pet. App. at 31-32.) This thorough analysis is sound and should put the issue to rest. Nothing about the logic or result merits this Court's attention.

III. THIS COURT SHOULD NOT REVIEW THE DISTRICT COURT'S ORDER BARRING MIHAILOVICH'S EXPERT WITNESS WHERE THE CIRCUIT COURT DID NOT REACH THE ISSUE, THE ISSUE WAS NOT PROPERLY RAISED IN THE QUESTION PRESENTED FOR REVIEW AND THE ISSUE IS MOOT.

At the trial, the district court entered an order *in limine*, barring Mihailovich's expert, William Berg, from testifying as an opinion or a fact witness. Mihailovich raised the propriety of this ruling on appeal, but in light of the fact that the district court "gave little explanation of its reasons" for barring Berg, the circuit court did not decide it, stating instead that it "would leave it up to the district court on remand to determine whether Berg's methodology reflects sufficient intellectual and professional rigor to render his opinions trustworthy enough to reach the jury." (Pet. App. at 53-54.) Thus, there is no final order as to the admissibility of Berg's testimony and petitioners may not properly raise the admissibility of this evidence here. (Pet. at 16.)

Traditionally, this Court has refused to consider claims that were not decided below. *United States v. Williams*, 504 U.S. 36, 41 (1992); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992); *Glover v. United States*, 531 U.S. 198, 205 (2001). This case does not present a reason to break with that tradition.

Moreover, the issue was not properly presented as a question by the petition for certiorari. Under this Court's Rule 14.1(a), the issue should be rejected for that reason as well. *Glover v. United States*, 531 U.S. 198, 205 (2001). Finally, on remand the issue may never arise; thus, at this point it is moot. *DeFunis v. Odergaard*, 416 U.S. 312, 318 (1974).

CONCLUSION

Plaintiff-respondent Helen Mihailovich was injured eighteen years ago. She was deprived of her right to have her case against the County decided by a jury and she was deprived of a proper trial on her legal malpractice case against petitioners. Her proper day in court should not be delayed any longer.

Petitioners have not raised any issue meriting this Court's attention. The petition for a writ of certiorari ought to be denied.

Respectfully submitted,

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